YAP SING HOCK & ANOR.

v.

PUBLIC PROSECUTER

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
PEH SWEE CHIN SCJ
ANUAR ZAINAL ABIDIN J
[CRIMINAL APPLICATION NO. 06-7-90]
3 AUGUST 1992

COMPANY LAW: *Lifting of corporate veil - Courts have lifted veil to do justice in civil cases - Whether lifting of corporate veil can apply in a criminal case - Directors of limited company charged for criminal breach of trust under s. 409 Penal Code.*

COMPANY LAW: *Appellants charged as directors of limited company for criminal breach of trust - Whether appointment of both appellants as directors valid - Non-compliance with ss. 123(4), 124(1) Companies Act 1965 - Definition of "director" in s. 4 of Companies Act 1965 - Director is sole contributor of paid up capital and sole beneficial owner of all issued shares of company - Director paid out monies from company's funds to third party - Whether director can be said to have committed offence of criminal breach of trust under s. 409 Penal Code - Section 422 Criminal Procedure Code - Whether Court should apply the provision when irregularity involves breach of a principle of general importance to the administration of criminal justice.*

The appellants were charged for two offences, being the 1st and 2nd charge under s. 409 of the Penal Code i.e. criminal breach of trust and the 3rd charge under s. 67(3) of the Companies Act 1965. Both the appellants were convicted and sentenced by the Sessions Court, Johore Bahru to 3 years imprisonment each on the 1st and 2nd charge with both sentences to run concurrently. As for the 3rd charge, both the appellants were sentenced to a fine of RM2,500 in default 3 months imprisonment. On appeal, the High Court, Johore Baru upheld the convictions and sentences and dismissed the appeal. The appellants obtained leave to reserve 4 questions of law for determination by the Supreme Court under s. 66 of the Court of Judicature Act 1964. They were as follows:

1. Whether the definition of "director" under s. 4 of the Companies Act 1965, a person can be held or deemed to be a director of a private limited company?
2. Whether in the non-compliance with s. 123(1) and (4) of the Companies Act 1965, a person can be held or deemed to be a director of a private limited company?
3. If the answer to question 2 is in the negative, can a person who is being charged as an agent, or as a director of a private limited company and in that capacity be held to act as an *ad hoc* agent by the said company?
4. Whether a director/member of a private limited company can be said to have committed an offence under s. 409 of the Penal Code by paying out monies from the said company's funds to a third party when he is the sole contributor of the paid-up capital and ultimately, the sole beneficial owner of all the issued shares of the said company?

Held:

[1] The 1st question was answered in the negative in the context of criminal charges under the Penal Code and any other law except for statutory offences and requirements created and imposed by the Companies Act 1965 as the case may be. Such being the case, the 2nd and 3rd questions did not arise.

[2] The 4th question was not answered as a pure question of law with a simple "negative" or "affirmative" for reason that its wording is wide of the mark and is ambiguous. The question as posed can only be answered with reference to the ingredients of an offence such as dishonest intention and so forth.

[3] The convictions and sentences on the 1st and 2nd charges against the appellants were ordered to be quashed. The conviction and sentence on the 3rd charge was confirmed.

[1st question answered in negative, 2nd and 3rd questions not considered, 4th question declined to be answered. Conviction and sentence on 1st and 2nd charge quashed. Conviction and sentence on 3rd charge confirmed.]

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG SYARIKAT: *Menyelak tabir korporat - Mahkamah telah menyelak tabir untuk membuat keadilan dalam kes-kes sivil - Samada penyelakan tabir korporat boleh dipakai dalam kes jenayah - Pengarah-pengarah syarikat berhad dituduh melakukan pecah amanah jenayah di bawah s. 409 Kanun Keseksaan.*

UNDANG-UNDANG SYARIKAT: *Perayu - perayu dituduh melakukan pecah amanah jenayah di bawah s. 409 Kanun Keseksaan - Perayu-perayu dipertuduh sebagai pengarah-pengarah syarikat berhad - Samada perlantikan kedua-dua perayu sebagai Pengarah adalah sah - Ketidakpatuhan s. 123(4) dan s. 124(1) Akta Syarikat 1965 - Pentakrifan "Director (Pengarah)" dalam s. 4 Akta Syarikat 1965 - Pengarah ialah penyumbang tunggal modal berbayar dan pemilik benefisial tunggal syer-syer terbitan syarikat - Pengarah mengeluarkan wang dari dana syarikat bagi membayar pihak ketiga - Samada pengarah boleh dikatakan sebagai telah melakukan pecah amanah jenayah di bawah s. 409 Kanun Keseksaan - Seksyen 422 Kanun Prosedur Jenayah - Samada Mahkamah harus memakai peruntukan tersebut apabila luar aturan melibatkan perlanggaran suatu prinsip yang secara umumnya penting kepada pentadbiran keadilan jenayah.*

Perayu-perayu telah dituduh atas dua kesalahan, tuduhan pertama dan kedua di bawah s. 409 Kanun Keseksaan iaitu pecah amanah jenayah dan tuduhan ketiga di bawah s. 67(3) Akta Syarikat 1965. Kedua-dua perayu telah disabitkan kesalahan dan dijatuhkan hukuman oleh Mahkamah Sesyen, Johor Bahru masing-masing kepada 3 tahun pemenjaraan atas tuduhan pertama dan kedua di mana kedua-dua hukuman berjalan secara bersama. Berhubung dengan tuduhan ketiga kedua-dua perayu telah dijatuhkan hukuman denda sebanyak RM2,500 dan jika ingkar dipenjarakan selama 3 bulan. Apabila rayuan dibuat, Mahkamah Tinggi Johor Bahru telah mengekalkan kesabitan kesalahan dan hukuman tersebut dan menolak rayuan berkenaan. Perayu-perayu telah mendapatkan kebenaran untuk merizabkan 4 persoalan undang -undang untuk diputuskan oleh Mahkamah Agung di bawah s. 66 Akta Mahkamah Keadilan 1964. Ianya adalah seperti berikut:

1. Samada pentafrifan "Director (Pengarah)" di bawah s. 4 Akta Syarikat 1965, seseorang itu boleh dikatakan atau disifatkan sebagai pengarah sesebuah syarikat sendirian berhad?
2. Samada dengan ketidakpatuhan s. 123(1) dan (4) Akta Syarikat 1965, seseorang itu boleh dikatakan atau disifatkan sebagai pengarah sesebuah syarikat sendirian berhad?

3. Sekiranya jawapan kepada soalan 2 ialah negatif, bolehkah seseorang yang dituduh selaku seorang ejen atau selaku pengarah sesebuah syarikat sendirian berhad dan atas kapasitinya itu dikatakan mewakili sebagai seorang ejen ad-hoc oleh syarikat tersebut?

4. Samada seorang pengarah/ahli sesebuah syarikat sendirian berhad boleh dikatakan sebagai telah melakukan suatu kesalahan di bawah s. 409 Kanun Keseksaan dengan menggunakan wang dari dana syarikat untuk dibayar kepada pihak ketiga di mana beliau merupakan penyumbang tunggal modal berbayar dan yang pada dasarnya, pemilik benefisial tunggal akan kesemua syer-syer terbitan syarikat tersebut?

Diputuskan:

[1] Persoalan pertama telah dijawab dalam bentuk negatif dalam konteks pertuduhan jenayah di bawah Kanun Keseksaan dan sebarang undang-undang lain kecuali bagi kesalahan-kesalahan statutori dan kehendak-kehendak yang diwujudkan dan dikenakan oleh Akta Syarikat 1965 sebagaimana yang berkenaan. Oleh yang demikian, persoalan-persoalan kedua dan ketiga tidak timbul.

[2] Mahkamah Agung enggan menjawab persoalan keempat sebagai suatu persoalan undang - undang yang tulin dengan memberikan jawapan yang mudah dalam bentuk "negatif" atau "afirmatif" atas alasan bahawa susunan kata-katanya adalah jauh dari maksudnya dan samar -samar. Persoalan yang dikemukakan itu hanya boleh dijawab dengan merujuk kepada kandungan sesuatu kesalahan seperti niat tidak jujur dan sebagainya.

[3] Kesabitan kesalahan dan hukuman ke atas tuduhan pertama dan kedua terhadap perayu -perayu telah diperintahkan supaya dibatalkan kesabitan kesalahan dan hukuman ke atas tuduhan ketiga disahkan.

[Persoalan pertama dijawab dalam bentuk negatif. Persoalan kedua & ketiga tidak dipertimbangkan. Persoalan keempat enggan dijawab. Kesabitan kesalahan dan hukuman ke atas tuduhan pertama dan kedua dibatalkan. Kesabitan kesalahan dan hukuman ke atas tuduhan ketiga disahkan.]

Cases referred to:

Dean v. Hiesler [1942] 2 All ER 340 ***(refd)***
Tan Choo Wah v. PP [1976] 2 MLJ 95 ***(refd)***
PP v. Yeok Teck Chye [1981] 2 MLJ 176 ***(refd)***
Kwang Ping Bong & Anor. v. The Queen [1979] AC 609 ***(foll)***
Salomon v. Salomon & Co. Ltd. [1897] AC 22 ***(foll)***
Daimler Co. Ltd. v. Continental Tyre and Rubber Ltd. [1916] 2 AC 307 ***(refd)***
Jones v. Lipman [1962] 1 All ER 442 ***(refd)***
Ebrahimi v. Westbourne Galleries Ltd. [1973] AC 360 ***(refd)***
Attorney - General's Reference No. 2 of 1982 [1984] QB 624 ***(foll)***
Belmont Finance Corp. Ltd. v. Williams Furniture Ltd. [1979] Ch 250 ***(foll)***
R v. Ralph Roffel [1984] Ast Crim Rp 135 ***(not foll)***
Tesco Supermarkets Ltd. v. Mattras [1972] AC 153 ***(not foll)***
DPP v. Kent and Sussex Contractors Ltd. [1944] KB 146 ***(refd)***

Legislation referred to:

Companies Act 1965 ss. 4, 67, 67(3), 113, 123(1), (4), 125, 130
Court of Judicature Act 1964 s. 66
Criminal Procedure Code s. 422
Defence (General) Regulations, reg. 91 [UK]
Penal Code ss. 23, 24, 405, 409

Other sources referred to:
Text Book of Criminal Law, Professor Glenville Williams, 2nd Edn.
Shorter Oxford Dictionary, 3rd Edn.

For the 1st appellant/applicant - G. Sri Ram (Arther Lee Meng Kuang with him); M/s. Sri Ram & Co.
For the 2nd appellant/applicant - Kadir Kassim
For the respondent - Ng Aik Guan, DPP

JUDGMENT

Peh Swee Chin SCJ:

Four questions of law were earlier allowed to be reserved for determination by this Court under s. 66 of the Court of Judicature Act 1964. They are as follows:

1. Whether the definition of "director" under s. 4 of the Companies Act 1965, a person can be held or deemed to be a director of a private limited company?
2. Whether, in the non-compliance with s. 123(1) and (4) of the Companies Act 1965 a person can be held or deemed to be a director of a private limited company?
3. If the answer to question 2 is in the negative, can a person who is being charged as an agent, or as a director of a private limited company and in that capacity be held to act as an ad-hoc agent by the said company?
4. Whether a director/member of a private limited company can be said to have committed an offence under s. 409 of the Penal Code by paying out monies from the said company's funds to a third party when he is the sole contributor of the paid-up capital and ultimately, the sole beneficial owner of all the issued shares of the said company?

It would be necessary to set out some material facts whenever it is necessary to do so in this judgment.

Three of the charges against the appellants on which they were convicted and which were connected with the four questions were as follows:

1st charge:

That you jointly on 30 April 1985, at the Hongkong and Shanghai Banking Corporation, No. 1, Jalan Bukit Timbalan, in the district of Johor Bahru, in the State of Johor, being agents of Lien Hoe Sawmill Company Sdn. Bhd., to wit, directors and in such capacities entrusted with the dominion over certain property, to wit, RM12,000,000 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

2nd charge:

That you jointly on 10 May 1985, in the district of Johor Bahru, in the State of Johor, being agents of Yap Sing Hock Holdings Sdn. Bhd., to wit, directors and in such capacities entrusted with the dominion over certain property, to wit, RM2,500,751 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

3rd charge:

That you jointly on 30 April 1985, at the Hongkong and Shanghai Banking Corporation, No. 1, Jalan Bukit Timbalan, in the district of Johor Bahru, in the State of Johor, being officers of Lien Hoe Sawmill Company Sdn. Bhd., to wit, directors did give financial assistance to Yap Sing Hock Holdings Sdn. Bhd. for the purpose of a purchase of 4,413,284 shares in the former company, and you have thereby committed an offence punishable under s. 67(3) of the Companies Act 1965.

The appellants were sentenced by the Sessions Court and their sentences were upheld by the High Court when their appeals were dismissed. The sentences are 3 years' imprisonment each on the 1st and 2nd charges with both sentences to run concurrently; a fine only of RM2,500 in default, three months' imprisonment on the 3rd charge.

Both appellants were already directors of Yap Sing Hock Holdings Sdn. Bhd., the company named in the 2nd charge before the events took place on the dates mentioned in the three charges. Further and significantly, the 1st appellant was the beneficial owner of all the shares or issued capital of this company (hereinafter called the Holdings Company) and his co-directors had held all their shares in the Holdings Company in trust for the 1st appellant by deeds of trust, *viz*. Exh. D42A and 42B in Sessions Court. This fact of the Holdings Company being a one-man company owned 100% by the 1st appellant has never been disputed also.

Another company named in the 1st and 3rd charges, that is Lien Hoe Sawmill Co. Sdn. Bhd. (hereinafter called the Lien Hoe), prior to the dates in the said charges, as regards its issued capital was owned by two groups of shareholders who could be called majority shareholders and minority shareholders resectively.

Differences having arisen between these two groups they all found it expedient to sell all their shares to the Holdings Company and for that purpose a series of agreements were entered into for a total price of RM46 million. It would not be necessary to go into details of these agreements as these agreements were never in doubt nor their propriety disputed. It was not disputed that the sale by both groups of shareholders was to be transacted simultaneously and control of Lien Hoe was to pass to the Holdings Company only on full payment of the purchase price. Both groups of shareholders of Lien Hoe were represented by their respective solicitors all of whom would appear to be perfectly aware of the events either personally or as creditably informed by each other.

After several extensions of time to pay in full the purchase price and therefore to complete the sale, a final deadline was set for 30 April 1985 for the purpose. In April 1985 before 30 April 1985, a loan was obtained from banks including, Perwira Habib Bank and RM32 million was paid on 29 April 1985 to the two groups of shareholders who were the vendors leaving a balance of RM6 million to be paid by 30 April 1985.

On the crucial day that is 30 April 1985, the vendors, the appellants and the solicitors for the majority shareholders (*viz*. PW2) were present at the office of the manager of Hongkong Bank. Although the solicitors for minority shareholders of Lien Hoe was not present it was not disputed that he was kept informed by PW2, the solicitors for the majority shareholders. The 1st appellant and PW2 had earlier met the secretary of Lien Hoe and the latter had come also to the meeting at Hongkong Bank with a set of documents comprising resolutions of Lien Hoe relating to the sale. At the meeting, the vendors came also with Lien Hoe's cheque book and three fixed deposit receipts totalling RM12 million issued by the Hongkong Bank being money of Lien Hoe of the same amount placed with the bank. At the meeting the solicitor for another bank *viz*. Perwira Habib Bank, which had also lent the money to Holdings Company which was earlier paid to the vendors of shares of Lien Hoe, was also present.

At the meeting, it was agreed by all parties that the Hongkong Bank would lend RM12 million to Lien Hoe on application by the appellants as new directors of Lien Hoe to be secured by the three fixed deposits. The appellants were at the same time or contemporaneously appointed as new directors of Lien Hoe with three previous directors of Lien Hoe resigning as directors. As new directors, Lien Hoe lent the RM12 million to the Holdings Company. A new account in the name of Holdings Company was opened in the Hongkong Bank into

which the said RM12 million was paid. Out of the RM12 million, the appellants as directors of the Holdings Company settled the balance of RM6 million due to the vendors of the shares in Lien Hoe.

Lien Hoe became thus the wholly-owned subsidiary of the Holdings Company, the whole of the issued capital of the latter was as stated previously owned by the 1st appellant.

There was nothing surreptitious about the meeting, all parties present, including the solicitor of the Perwira Habib Bank did not appear to be aware at all whether anything they were doing was wrong, or that the transactions were anything in the nature of wheeling and dealing.

Subsequently, *viz*. the Perwira Habib Bank Bhd. placed Lien Hoe under receivership and appointed Price Waterhouse, chartered accountants as receivers and managers, and one Encik Ishak bin Hashim, the general manager of Perwira Habib Bank Bhd., was subsequent to such placement of Lien Hoe under such receivership and in order to recover money lent to Lien Hoe, appointed on 16 July 1986 as a director of Lien Hoe to look after such interests of the Perwira Habib Bank. Upon examining the books of Lien Hoe, he lodged a report to the police on 20 October 1986, being report No. 19317/86, at Johor Bahru, alleging that the board of directors of Lien Hoe had disregarded the interests of creditors with his belief that offences might have been committed. This report undoubtedly and ultimately led to the charges including the charges concerned herewith being laid against the appellants. This would seem to run counter presumably to the view of the solicitor for Perwira Habib Bank who did not voice any objection at the crucial meeting on 30 April 1985.

Among the circular resolutions was one dealing with the appointment of the appellants as new directors *viz*. Exh. P28 on which both parties set great store and which is set out below:

Appointment of New Directors

Resolved that the following three gentlemen be and are hereby appointed directors of the Company subject to their completion of the statutory documents as required under s. 123(1) and (4) of the Companies Act 1965:

(a) Dato Yap Sing Hock (I/C. 0684644)
1-A, Jalan Stulang Darat, Johore Bahru, Johore.

(b) Yap Seng Chang (I/C. 4112475)
72-A, Jalan Mahkota, Taman Iskandar, Johore Bahru, Johore.

(C) Abdul Hamid bin Mohd. Tahir (I/C. 3735688)
21, Jalan K-4, Taman Tampoi Baru, Johore Bahru, Johore.

The learned Sessions Court Judge found that the appellants had become new directors in pursuance thereof but it was the contention of the defence that the said resolution did not create a valid appointment of both appellants as directors, *inter alia,* because of s. 123(4) and s. 124(1) of the Companies Act 1965 which is set out below:

Section 123 -

(1) xxx xxx xxx xxx xxx

(2) xxx xxx xxx xxx xxx

(3) xxx xxx xxx xxx xxx

(4) Every person shall before he is appointed a director of a company make and lodge with the Registrar and the Official Receiver a statutory declaration in the form prescribed by regulations that he will not be acting in contravention of s. 125 and 130.

Section 125 -

(1) Every person who being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any corporation except with the leave of the Court shall be guilty of an offence against this Act.

Penalty: Imprisonment for three years or ten thousand ringgit or both.

It was not and could not be disputed that no such statutory declarations were made and lodged by both the appellants on 30 April 1985 in accordance with the provisions of the sections quoted above. Therefore it was submitted that the prosecution had failed to prove that they were directors of Lien Hoe as stated in the 1st and 3rd charges on 30 April 1985. This submission was renewed before us by learned Counsel for the appellants.

It was submitted by learned Deputy before us that both appellants were in law directors of Lien Hoe because of s. 4 of the Companies Act 1965 which defined director as including non director who was in the position of a director by whatever name called it. Section 4 is set out below:

Section 4(1) of this Act, unless the contrary intention appears:

xxx xxx xxx xxx xxx xxx xxx xxx

"director" includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

The learned Deputy, with considerable force renewed the submission that by instructing the cheque (Exh. P15) to be prepared for transfer of the said RM12 million in question from Lien Hoe to the Holdings Company, the appellants had put on the mantle as directors of Lien Hoe and come within the definition of directors. There was sufficient evidence to prove this. On the same evidence it was submitted both the appellants were agents nonetheless of Lien Hoe as stated in the charges.

It was submitted for the defence that the stand of the prosecution and the issue as well was that the appellants were directors of Lien Hoe on 30 April 1985 as stated in the 1st charge. The case of *Dean v. Hiesler* [1942] 2 All ER 340 was cited again before us. The High Court below referred to the evidence and s. 4 of the Companies Act and found little assistance from *Dean v. Hiesler* holding that they were directors for the purpose of the 1st and 3rd charges.

As we have stated elsewhere the principle of the duty of the prosecution to prove beyond a reasonable doubt every ingredient of a charge, is a principle too plain to require any authority to support it; also a principle of great and fundamental importance at the same time.

Having regard to the wording in the 1st charge question is whether both directors were charged as directors of Lien Hoe? The 1st charge stated that both appellants:

... being agents of Lien Hoe Sawmill Company Sdn. Bhd., to wit, directors and in such capacities entrusted with the dominion etc.

According to *Shorter Oxford Dictionary*, 3rd Edn., the words "to wit" mean "namely or that is to say ...". The meaning therefore would be that they were charged as directors and in that capacity were entrusted with the money in question as agents of Lien Hoe, the words "to wit" preceding the word "director" would appear to us to be emphasizing the office of the directors held by the appellants through the instrumentality of which they were entrusted as agents of the money in question.

This was the basis on which the case was proceeded with in the lower Courts, to which both parties have directed their energies to. No application for amendment of the charge by deleting the words "to wit directors" has been made at any time, or any suggestion therefore made.

The definition or directors in s. 4 of the Companies Act 1965, in our view, cannot be applied to the charges preferred under the Penal Code and any other law for that matter (except) under the Companies Act 1965 itself) which has to be strictly construed in favour of liberty. Whether both appellants were directors or not became a question of fact which the prosecution had to prove beyond a reasonable doubt. The same view was espoused by the Court of King's Bench comprising 3 Judges in *Dean v. Hiesler* in which the accused was charged as being a director of a company in connection with certain offences under reg. 91 of the Defence (General) Regulations. It was held that reg. 91 in question, being a penal enactment, must be construed strictly in favour of the defence and the accused who had not been duly appointed as director of the company in question, could be such a director. Similar argument was advanced there about the definition of director in the Companies Act 1929 of Britain being extended to a person in the position of a director though not an actual director was rejected. We are in entire agreement with the reasoning behind the rejection of such similar argument. Only for compliance with all the requirements of the Companies Act 1965 and the prosecution of the offences created by the said Act, the definition of director in the Act applies.

Reverting back to the first question reserved to this Court for determination, on a criminal charge under the Penal Code, it should be answered in the negative. Such being the case, the answers to the second and third questions referred to us would not arise.

Nonetheless we think it desirable to state our view on the 3rd question briefly. Any person, whether a director or not, can be charged as an agent of a company in respect of an offence committed against the company, if such agency can be determined from the evidence adduced, please see *Tan Choo Wah v. PP* [1976] 2 MLJ 95 and *PP v. Yeok Teck Chye* [1981] 2 MLJ 176. It follows, that a director, normally regarded *ipso facto* as an agent of the company ought not to be charged as agent of the company in respect of an offence committed against the company when he was not involved in the commission of the offence at all, this is of course not with specific reference to the charges against the appellants in this case.

Speaking generally, we wish to make one observation once again. The charges as framed under s. 409 in this case have not adhered strictly to the wording of s. 409 which is set out below:

> Section 409: Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

The modifying words: "in his capacity" refer to a public servant and the words "in the way of his business"refer to "banker, agent etc ...". Decided cases on the phrases do not necessarily apply to both situations provided by the two different phrases for one thing; and it could even lead to even serious arguments in Court.

It has occurred to us that in regard to the seemingly technical nature of the wording of the 1st charge in question, whether we should amend it at this stage by deleting the words "to wit, directors" from the 1st charge so as to preserve the conviction already upheld by the

High Court, as was done in *Yeok Teck Chye supra*, but whereas in that case facts justifying such a cause of action would not cause any injustice as found and stated in that case but the circumstances in this case would not be of such a variety.

In the instant case, it was hotly contested, the case was conducted with the veritable spirit of the adversarial system on the issue whether the appellants were directors on 30 April 1985 and the issue was one all parties, have concentrated their energies on and above all, the prosecution has never deemed it fit at any stage to even suggest an amendment in any way, and has throughout the case put forward a legal view of facts on the question such that any Court if so disposed towards an amendment on its own motion could not do so without being unfair or appearing to be unfair to one of two sides. After all a Court in a criminal case would have, generally speaking, to hold the scales between the interests of the prosecution on the one hand and those of the accused on the other. We do not propose to amend the 1st charge.

It has also occurred to us whether we should apply s. 422 of our Criminal Procedure Code which provides that no order or finding should be reversed or altered on account of, e.g. any irregularity, etc. in the charge, etc. unless such error has occasioned a failure of justice. The error or what looks like an error in the instant case seems to be technical. Whether any Court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the Court would not apply s. 422, as this appears to us to be the same thing as the irregularity has occasioned a failure of justice. It is a fundamental principle in our law that the prosecution has to prove beyond a reasonable doubt every ingredient of the offence or charge. This principle is involved in the irregularity of the 1st charge here. In saying all this, we have also adopted with great respect, the similar reasoning of Lord Diplock in the Privy Council in *Kwang Ping Bong & Anor v. The Queen* [1979] AC 609, 615. We would not apply s. 422 of the Criminal Procedure Code.

To sum up at this stage of our judgment, for reasons given, conviction under 1st charge cannot stand.

We now deal with the 4th question as set out at the beginning of the judgment and the 4th question has close connection with the 3rd charge. The answer to this question will depend partly on an answer to another question as to whether the principle of distinction and separateness of a corporation as a legal entity from its members and shareholders as established by the leading case of *Salomon v. Salomon & Co. Ltd.* [1897] AC 22 applies inviolably to criminal cases under the Penal Code. If the answer to this question of applicability of the said principle is affirmative, then our answer to the 4th question posed may be similarly affirmative.

Let us now discuss below this matter from several aspects in order to search for this rather vexed and elusive answer.

The said principle (hereinafter called the primary principle) stated above is sometimes referred to as the veil of incorporation and it gives rise to another principle of lifting of the veil of incorporation for certain reasons. Such veil has been lifted by statutes e.g. the Companies Act 1965 itself or by the Courts for certain specified purposes. The lifting of the veil clearly constitutes a violation of the primary principle but this has come to be treated correctly as an exception to the primary principle with such exception being subject to the parameters and perimeters indicated by the statutes or by the specified purposes so far indicated by the Courts when lifting the veil.

It would not be necessary to set out many examples of lifting of the corporate veil by statutes except by just mentioning one, *viz*. the Companies Act 1965 requires group accounts for both holding and subsidiary companies, thus throwing light on the relationship between a holding company and its subsidiaries.

When the Court lifts the veil, from the decided cases, it does so to do justice limited to a few purposes some of which are set out below. First, it is for purpose of tax cases in order to ascertain tax liability or for detecting tax evasion. The law reports are full of these cases. Secondly it is for the purpose of detecting any trading with enemy. Please see *Daimler Co. Ltd. v. Continental Tyre and Rubber Ltd.* [1916] 2 AC 307. Thirdly it is for some illegal or improper purpose directed against a third party, e.g. where vendor of land in *Jones v. Lipman* [1962] 1 All ER 442 in breach of contract of sale of land tried to avoid an action for specific performance of contract regarding the land by transferring the land to a company which he had formed. There are a great number of cases involving some other illegal or improper purposes. Fourthly where facts are such the Court lifts the veil on account of equitable considerations, please see e.g. *Ibrahimi v. Westbourne Galleries Ltd.* [1973] AC 360.

The category for such purposes for which the Court will lift the veil is never closed. A Court has always the discretion to have a crack at it to do justice.

It will be argued that to do justice will involve doing justice to an accused person whose liberty is imperilled and whose innocence is presumed until proven guilty. However the legal position is far more intricate than this simple argument suggests.

All the cases for which the Courts have lifted the veil to do justice seem to be civil cases or due to illegal and improper purposes directed against the third parties or outsiders to the companies in question who have or would have suffered damage but for the lifting of such veil. In each of those cases, it would seem that the company in question has been used as an engine of fraud or wrongful deprivation, etc. In our instant case, both appellants cannot be in the shoes of such persons and they were charged in a criminal case for offences against the property of the company in question. The lifting of the veil in such criminal cases will not be supported by the decided cases but it will be patently irrational if one considers the real reason for lifting the corporate veil.

Yet another reason is that if the primary principle were not to apply to criminal cases under the Penal Code it would mean that the primary principle would be replaced by a good deal of awesome uncertainties of great magnitude; awesome because of the tremendous number of limited liability companies nowadays playing such a predominant role in the commercial life of any country.

It is sufficient if we discuss two cases, one of which upheld the said primary principle while the other obviously, though not expressly, rejected the application of the said primary principle in criminal cases.

The first of such case would have to be *Attorney - General's Reference No. 2 of 1982* [1984] QB 624, where the question posed to the Queen's Bench comprising Watkins and Kerr LJJ, is remarkably similar to the question before us presently. The question there was:

> Whether a man in total control of a limited liability company (by reason of his shareholding and directorship) is capable of stealing the property of the company; and whether two men in total control of a limited liability company (by reason of their shareholdings and directorships) are, (while acting in concert) capable of jointly stealing the property of the company.

The accused persons were charged with theft of money from a company totally owned and controlled by them. The learned Judge held that they had no case to answer at the end of prosecution case and directed the jury to acquit them. The Attorney-General referred the quoted question to the Queen's Bench.

It is to be borne in mind that theft, under the Theft Act 1968 of Britain is *inter alia*, dishonestly appropriating of property of another. "Dishonest" or "dishonestly" would appear to bear the common dictionary meaning of intention to cheat or deceive and whereas our Penal Code defines "dishonestly" differently and about which we will deal later.

In the *Attorney-General's Reference supra*, Kerr LJ delivering the judgment disagreed that there was no case to answer at the end of the prosecution case and after reviewing a number of cases, his Lordship relied on a civil case *viz. Belmont Finance Corp. Ltd. v. Williams Furniture Ltd.* [1979] Ch 250. In *Belmont*, directors (who were shareholders also) used the company's fund to buy shares of another company at an excessive price. The receiver appointed sued them for damage for breach of trust and misfeasance. The High Court dismissed the claim but the Court of Appeal reversed the High Court's decision for reason that since the directors knew it was an illegal transaction, their knowledge could not be imparted to their company which was a victim of such conspiracy and could not be regarded as a party to the conspiracy. Kerr LJ *inter alia*, held that the position should be the same in criminal law and held further that view was in accord with the view of Professor Glenville William's '*Text Book of Criminal Law*, 2nd Edn.

The other case that went against the decision in *Attorney-General's reference, supra*, is *R v. Ralph Roffel* [1984] Ast Crim Rp 135, a decision by a majority of 2 to 1 in the Court of Criminal Appeal of Victoria, Australia. In that case, the accused was convicted of stealing a cheque, being property to the company of which he and his wife were the sole shareholders and directors. On appeal, against conviction, the appeal was allowed by such majority. It was held to be sufficient that the whole transaction was consensual, and consent was foreign to the notion of usurpation which was the element of theft. The majority further disapproved the *Attorney-General's Reference, supra*, and approved the concept of a man being the directing mind and will of a company and therefore the embodiment of the company, not just his agent or servant, as propounded by Lord Reid also in *Tesco Supermarkets Ltd. v. Mattras* [1972] AC 153, 170 - a case in which a company was prosecuted, and not a case in which someone was charged for committing an offence against a company. The reliance by the Court there on *Tesco Supermarkets* would not appear to us to be suitable.

The passage of Lord Reid in *Tesco Supermarket* relied on by a majority is set out below:

> I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the person of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

We would comment on *Tesco Supermarkets*. At common law, one of the difficulties of prosecuting a company which has to act by necessity through human agency is the absence of a rule similar to the rule of vicarious liability in civil law, for to find a company guilty, *mens rea* is a necessary element. Modern statutes have made a company stand in the shoes of a master or principal liable for offences committed by servants or agents and have in some cases dispensed totally with the requirement of *mens rea* against a company or any offender. However, starting prominently with the case of *DPP v. Kent and Sussex Contractors Ltd*. [1944] KB 146 and other ensuing cases, it has been held, directly or indirectly that a company CAN be held liable for offences 'personally' without the need to prove any agency or relationships of master and servant, even in the absence of any statutory provision for express vicarious liability against a company, where the officer or director of the company can be regarded from evidence as the directing mind or the controlling will of the company so as to become its embodiment.

Tesco Supermarkets brought out this concept clearly. The Supermarkets company had hundreds of shop managers and was charged, not vicariously, for an offence committed by one of its shop managers in failing to ensure the goods advertised for sale at a particular price was in fact sold at the price. Lord Reid after making the passage cited, went on to hold the board of directors had never delegated their functions to any of these shop managers and therefore the acts of the shop manager in question was not that of the supermarket company which, in consequence, was not guilty of the offence under Trade Description Act 1968 of Britain.

Having regard to the case mentioned, we are of the view that the *Attorney-General's Reference, supra*, was rightly decided and we disagree with the majority judgment in *Ralph Roffel*. We also approve the *dictum* of Buckley LJ in *Belmont* which was adopted by Kerr LJ in *Attorney-General's Reference*. The consent or knowledge of a sole shareholder and director of even a one man company can NOT be treated as the knowledge and consent of the company itself when the company is a victim of fraud or of any illegal deprivation of its assets. The concept of a person e.g. a director of a company being the company's directing mind cannot apply when the company is such a victim for offences against the company, but only when the company is prosecuted for an offence where the prosecution cannot rely on any statute or statutorily vicarious criminal liability. We are prepared to say without hesitation the said primary principle applies inviolably in cases in which a company is a victim of fraud or wrongful deprivation and in criminal offences against the property of the company. A simple illustration will make it clear. Supposing a managing director of a public company draws a tremendously large sum of special remuneration for himself so as to clearly amount to cheating the company, and if he is charged, it will be unthinkable for him to set up a defence that he is the company's directing will and controlling mind. We think the said primary principle applies to criminal offences, but this does not enable us to give an answer to the 4th question.

Although the said primary principle of the company being a legal entity applies to criminal cases, we are unable to answer the 4th question with a simple "negative" or "affirmative" for reason that its wording is wide off the mark and is ambiguous. We cannot therefore answer this question as a pure question of law.

To answer the question in the negative would mean that under no circumstances a director/ member of a private limited company can be said to have committed an offence under s. 409 of the Penal Code if he pays out money from the said company's funds to a third party

where he is the sole contributor of the paid-up capital and the sole beneficial owner of all the issued shares of the said company, we would say that an offence under the said section may be committed depending on the facts of the surrounding circumstances of each particular case.

On the other hand, to answer the question in the affirmative would necessarily mean that such a director or member in terms envisaged by the question would *per se* commit an offence under the section whether or not there was any dishonest intention.

We would say that the question as posed can only be answered with reference to the ingredients of an offence such as dishonest intention and so forth. In consideration we decline to answer the 4th question as framed.

We think it would be necessary to deal with the meaning of the words: "criminal breach of trust" as contained in the 2nd charge which is now dealt with. Section 405 of the Penal Code defines criminal breach of trust as "whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust".

The *mens rea* element is contained in the word "dishonestly" and s. 24 defines it as "whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do the thing dishonestly". Section 23 defines wrongful loss and wrongful gain thus: "Wrongful loss, is the loss by unlawful means of property to which a person losing it is legally entitled. A person is said to gain wrongfully when such person retains wrongfully, as well as such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property".

One will be immediately struck with the realization that the word "dishonestly" is not understood in the common parlance of the dictionary meaning of intention to cheat or deceive. It is thus not synonymous with "fraudulently" used in relation to other sections in the Penal Code, which defines the latter by s. 25 as: "a person said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise". The word "dishonestly" is therefore understood differently in England. Bearing in mind the omnipresence of *mens rea* (in the absence of its exclusion, express or implied) it is legitimate and in fact it is essential to understand the connection between the word "intention" used in connection with "intention" to cause wrongful loss or wrongful gain" AND *mens rea.*

The word "intention" or "intentionally" or any other similar expression (such as 'with intent') does refer to *mens rea* which however has a wider scope in meaning and generally means the mental element of the offence. Since moral wickedness or turpitude is indicated in many cases, it ought to be borne in mind that such moral turpitude must have been part and parcel of the definition of the offence in question such as indicated by the use of prescribed words such as "fraudulently" or with intent to deceive". The word, intention, has acquired a modern meaning which is interwoven with the history of *mens rea* with which it is desirable to deal very briefly.

It is believed in ancient times, the strict liability of crimes prevailed before the advent of *mens rea.* It is believed further that because of the influences of religious law it came to be gradually accepted by the Courts that a man should not be punished unless he knew what he did was wrong, *actus non reus nisi men sit rea*. The moral standard was found at times to be unstable for what was regarded as offensive was not so regarded in another part of the same century, and moral standards do change with times, (the extreme example would be the legalization of homesexuality offence between consenting males in Britain, in this century).

Intention, at present, has acquired a special meaning as follows.

Intention means that a man intends to commit the offence or do the forbidden act as prescribed by law that is described by law, IF at or before time of the commission of the offence or the doing of the forbidden act, an accused person has foresight, (that is knows in advance) that his conduct will lead to the commission of the offence or the doing of the forbidden act as described or prescribed by law, irrespective of whether he knows it is such an offence or such a forbidden act, so described or as prescribed by law AND he desires the commission of such an offence or doing of such a forbidden act.

We may just as well add, by way of illustration, that where foresight above - described is present, but the desire above-described is absent, then it becomes the *mens rea* for "recklessness", such as offence of causing death by a reckless act. This is not the place or time to discuss further, except that moral wickedness has now practically disappeared from *mens rea* unless the law of offence prescribes or describes it.

It is with the present legal meaning of intention that we would have to deal with the evidence against the appellants whenever it is necessary to do so.

We now consider the 2nd charge as set out above which was not attended by such controversy as regards the proof of the actual directorship. It was not even disputed by the appellants or on their behalf that they were at the relevant time directors of the Holdings Company, the property of which was the subject of criminal breach of trust, and not the property of Lien Hoe.

On the 2nd charge, the evidence against the appellants was that 1st appellant had instructed the accountant of the Holdings Company to write a cheque for RM2,500,751 (the subject matter of the 2nd charge) in order to buy a banker's draft to be made payable to a sharebroking company called "Ariffin & Low Securities Sdn. Bhd." to buy shares in a public listed company called Muda Holdings Bhd. The cheque was signed by both appellants. The accountant was a certified accountant with the academic qualification of 'ACCA'. The payment voucher was prepared for the said cheque for Holdings Company with the words "advance to payee" and payee was the 1st appellant who signed the acknowledgement of receipt and the payment voucher was approved by 2nd appellant. The said accountant wrote on the reverse of the said payment voucher the words "Ariffin & Low Securities Sdn." to indicate the application for the banker's draft. The accounts produced showed the said advance and other advances to the 1st appellant from the Holdings Company. All the documents, evidence, cheque, payment voucher and accounts were all prepared long before the police investigation started. All these evidence was apparently accepted by the learned Sessions Court Judge, and the High Court did not accept it as a loan because his Lordship said to the effect that to give a loan there must be money (available) in order to give such a loan, and the sum of RM2,500,751 was wrongly gained or acquired by the Holdings Company out of the RM12 million transferred from Lien Hoe.

The 1st appellant in his defence admitted the loan but said to the effect that the loan was to enable him to gain control ultimately of the public listed company *viz.* Muda Holdings Bhd. when Lien Hoe would be sold at a handsome profit for this purpose.

We have the misfortune of differing from the very able Judge and we have to express our disagreement. Since the 2nd charge referred to the commission of breach of trust against the property of the Holdings Company and not Lien Hoe, it would not be appropriate to rely on the allegedly illegal origin or source of the money of the Holdings Company so as to stamp the money which was drawn out and lent to the 1st appellant as non-available legally for lending.

It must be observed that the loan or advance in the circumstances of this case as described above was not prohibited by the Companies Act 1965, for example, it was not a loan by Holdings Company to 1st appellant to buy shares in the Holding Company itself (e.g. s. 67 of the Act); neither was it a loan to directors as prohibited by s. 113 of the Act, the Holdings Company being an exempt private company, nor was it prohibited by memorandum and articles of association of the Holdings Company.

Since wrongful loss or wrongful gain, *inter alia,* is necessarily loss or gain by unlawful means, there is no evidence of unlawfulness about loan which could render the appellants to prosecution, bearing in mind what has been said just now. Of course the 1st appellant could be liable to an action by the Holdings Company to recover the loan, this, however, in our opinion, is definitely not enough and self-evidently so too, for a borrower can not be simply, said to cause loss to his lender by unlawful means because such borrower can be sued in Court. Both the appellants should not have been called for their defence. We therefore think his conviction under the 2nd charge cannot stand also.

Dealing with the 3rd charge, both appellants were charged under the Companies Act 1965 and not under the Penal Code so that the strict proof of directorship required for an offence under the Penal Code has been modified by the Companies Acts s. 4 wherein the definition of director includes a non director who occupies the position of a director by whatever name called, in order apparently to avoid any evasion of compliance with the provisions of the Act. Such being the case the conviction under the 3rd charge should remain undisturbed. This could be regarded as a curious result by some quarters as both appellants were also charged as directors of Lien Hoe in the 3rd charge as in the 1st charge, but such result has to be so reached when a Court has to give force to any fundamental and important principle of law in the administration of criminal justice explained earlier, where expediency of any kind would have to give way.

We feel we ought to express our view that had the appellants been rightly convicted on 1st and 2nd charges, it would be quite legitimate to accept, but only by way of a plea in mitigation of sentence, that the 1st appellant was the sole beneficial owner of all the shares of Holdings Company and of Lien Hoe by relation, so that no other shareholders in Lien Hoe or Holdings Company could be wronged and a further plea for a non-custodial sentence (other than a day's imprisonment to satisfy the mandatory requirement of imprisonment) and a fine could be exceptionally and favourably considered.

To summarize, we order that the convictions and sentences on the 1st and 2nd charges be quashed, and that conviction and sentence on the 3rd charge be confirmed.

Also, we answer the 1st question in the negative in the context of criminal charges under the Penal Code and any other law except for statutory offences and requirements created and imposed by the Companies Act 1965 as the case may be. Such being the case, the 2nd and 3rd questions do not arise. We further decline to answer the 4th question for reasons given earlier.

Also found at [1992] 4 CLJ 1950